Weidaya Sdn Bhd v DND Bina Holdings Sdn Bhd

HIGH COURT (KUCHING) — COMPANIES WINDING UP NO 28-17 OF 2006
HAMID SULTAN JC
29 JUNE 2007

Companies and Corporations — Winding Up — Inability to pay debts — Whether company unable to pay debts and ought to be wound up

The petitioner presented a winding up petition against the respondent pursuant to s 218(1) and s 218(2) of the Companies Act 1965. In opposing the petition, the respondent inter alia says that the petition is based only on a judgment in default and they are disputing the petitioner's claim. However, the respondent never applied to set aside the judgment in default.

Held, allowing the petition:

(1) There is no statutory right to wind up the company under Companies Act 1965. The Companies Act 1965 gives a discretion to the court to wind up the company upon the justice of the case. The court is not obliged to wind up a company because there is a judgment or judgment in default. The court when exercising its discretion must consider the justice of the case before the drastic step to wind up is exercised. For this very purpose, the court may look into the interest of the creditors as well as others who will directly or indirectly be affected by the order for winding up (see para 8).

(2) The issues raised by the respondent are one which do not justify consideration for the court not to exercise its discretion. The real issue which the winding up court will like to know is whether the company is able to pay the money notwithstanding the fact that there are irregularities in the statutory demand or compliance of the provisions of the Companies Act 1965 (see para 9).

[Bahasa Malaysia summary

Pempetisyen telah menyerahkan petisyen penggulungan terhadap responden menurut s 218(1) dan s 218(2) Akta Syarikat 1965. Dalam menentang petisyen, responden antara lain mengatakan bahawa petisyen adalah berdasarkan kepada penghakiman ingkar dan mereka mempertikaikan tuntutan pempetisyen. Walaubagaimanapun, responden tidak memohon untuk mengenepikan penghakiman ingkar.

Diputuskan, membenarkan petisyen:

(1) Tidak terdapat hak berkanun bagi menggulung syarikat di bawah Akta Syarikat 1965. Akta Syarikat 1965 memberikan budibicara untuk menggulung syarikat berdasarkan keadilan kes. Mahkamah tidak berkewajipan untuk menggulung syarikat kerana terdapat penghakiman atau penghakiman ingkar. Mahkamah apabila mengamalkan budibicaranya hendaklah menimbangkan keadilan kes sebelum langkah drastik penggulungan diamalkan. Untuk sebab ini, mahkamah mungkin melihat kepada kepentingan pemiutang-pemiutang dan lain-lain pihak yang akan secara langsung terlibat dengan perintah penggulungan (lihat perenggan 8).

(2) Isu-isu yang dibangkitkan oleh responden tidak memberikan balasan justifikasi untuk mahkamah tidak mengamalkan budibicaranya. Isu sebenar yang mana mahkamah penggulungan gemar mengetahuinya adalah sama ada syarikat berupaya membayar wang walau apapun terdapat fakta salah aturan dalam tuntutan statutori atau kepatuhan kepada peruntukkan-peruntukkan Akta Syarikat 1965 (lihat perenggan 9).]

Notes

For cases on inability to pay debts, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 949–1006.

Cases referred to

Amanah Merchant Bank Bhd v.Lim Tow Choon [1994] 1 MLJ 413 (refd)
Ban Lian Hardware Sdn Bhd v Usaco Manufacturing (M) Sdn Bhd [2001] 7 CLJ 161 (refd)
Dayakuasa Holdings Sdn Bhd v Kayaal Holdings Sdn Bhd [2003] 2 MLJ 263 (refd)
Eastool Industries Sdn Bhd v Getfirms Electronics (M) Sdn Bhd [2001] 2 MLJ 641 (refd)
Ho Siew Choong & Ors v Everworth Sdn Bhd [2005] 2 CLJ 273 (refd)
Kaledi Sdn Bhd v DND Bina Holdings Sdn Bhd, Norzehon Binti Ahmad & Dahlia Binti Madon Sessions Court at Miri in the State of Sarawak, Malaysia (unreported; Summons No 52–52–2005 (MR) & Execution No 56–1–2005 (MR) (refd)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd & Other Appeals [2001] 4 MLJ 187 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Pengkalen Concrete Sdn Bhd v Chow Mooi & Anor [2003] 3 MLJ 67 (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)
Sri Hartamas Development Sdn Bhd v Mbf Finance Bhd [1992] 1 MLJ 313 (refd)
Summit Company (M) Sdn Bhd v Nokko Products (M) Sdn Bhd [1984] 1 MLJ 68 (refd)
System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd [1999] 1 AMR 1187 (refd)
Teck Yow Brothers Hand-Bag Trading Company v Maharani Supermarket Sdn Bhd [1989] 1 MLJ 101 (refd)
United Malayan Banking Corporation Berhad v Richland Trade & Development Sdn Bhd [2000] 1 AMR 105 (refd)
United Merchant Finance Berhad v Magpie Resources Sdn Bhd [2001] 2 AMR 1801 (refd)

Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd [1994] 2 MLJ 266 (refd)

Legislation referred to

Companies Act 1965 ss 218(1), 218(2), 218(2)(a), 355(1), 355(2)
Interpretation Acts 1948 and 1967 s 12

William Wang (Messrs Sio & Ting Advocates, Kuching) for the petitioner.
Kenny Yi (Messrs Yi & Co Advocates, Miri) for the respondent.

Hamid Sultan JC:

[1] This is my judgment in respect of the winding up petition presented, pursuant to s 218(1) to be read with s 218(2) Companies Act 1965 (CA 1965).

[2] The petitioner and the respondent rely on the following authorities, namely:

(1) *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413

(2) *Pengkalen Concrete Sdn Bhd v Chow Mooi & Anor* [2003] 3 MLJ 67;

(3) *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd And Other Appeals* [2001] 4 MLJ 187

(4) *United Malayan Banking Corporation Berhad v Richland Trade & Development Sdn Bhd* [2000] 1 AMR 105;

(5) *Summit Company (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* [1984] 1 MLJ 68

(6) *Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd* [1994] 2 AMR 22

(7) *United Merchant Finance Berhad v Magpie Resources Sdn Bhd* [2001] 2 AMR 1801

(8) *Teck Yow Brothers Hand-Bag Trading Company v Maharani Supermarket Sdn Bhd* [1989] 1 MLJ 101

(9) *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313

(10) *System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd* [1999] 1 AMR 1187

(11) *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85

(12) *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281

(13) *Ban Lian Hardware Sdn Bhd v Usaco Manufacturing (M) Sdn Bhd* [2001] 7 CLJ 161

(14) *Dayakuasa Holdings Sdn Bhd v Kayaal Holdings Sdn Bhd* [2003] 2 MLJ 263

(15) *Ho Siew Choong & Ors v Everworth Sdn Bhd* [2005] 2 CLJ 273

(16) *Eastool Industries Sdn Bhd v Getfirms Electronics (M) Sdn Bhd* [2001] 2 MLJ 641.

[3] In support of the petition, the petitioner inter alia says:

(a) the company is indebted to the petitioner in the sum of RM14,800 for goods and materials supplied and delivered to the development and agriculture works undertaken and rendered to the company;

(b) in addition to that, by an admission vide a letter dated 4 July 2005, the respondent had through its director, confirmed and/or admitted that it owes the petitioner an outstanding amount of RM14,800 and further requested the petitioner to allow and/or extend time for the said payment of RM14,800 until 30 July 2005.

(c) the respondent did not honour its promise and has not paid the petitioner the said amount of RM14,800 after the date of 30 July 2005 and even until to date.

(d) as a result thereof, a judgment dated 31 October 2005 had been obtained and entered against the company on 14 September 2005 vide Summons No 72–1253–2005–B at Magistrate's Court at Kuching, Sarawak on the said sum of RM14,800 as at 12 May 2005 with interest accruing therefrom at the rate of 8% per month from the date of judgment which is 14 September 2005 until full and final payment and costs.

[4] In opposing the petition, the respondent inter alia says that it is only a judgment in default of appearance and they are disputing the petitioner's claim. However, the petitioner complains that the respondent has not filed an application to set aside the judgment. Further, the respondent, in opposing the petition, says that they did not receive the notice of demand and in consequence it is null and void for non compliance with s 218(2)(a) of the CA 1965. However, the petitioner says that they have served the statutory demand according to law.

[5] In support of the petition, the petitioner inter alia submits as follows:

(a) in the Supreme Court case of *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413, it was held inter alia that:

> once it was established that the notice of demand was sent through the post in an envelope addressed to the last known place of address of the defendant…it was not necessary for the appellant to show that the AR card had been returned duly acknowledged for there to have been effective service of the notice of demand;

(b) Order 62 r 4(1)(a) and (b) of RHC 1980 states that where an action is against a corporation;

> the writ may be served by leaving a copy of it by registered post addressed to the corporation at the office or sending a copy of it of registered post addressed to the corporation at the office, of, it there be more offices than one at the principal office of the corporation, whether such office be situated within Malaysia of elsewhere.

(c) the letter of demand attaching the judgment was sent to the respondent's registered and business address. Section 12 of the Interpretation Acts 1948 and 1967 (Act 388) reads as follows:

> Where a written law authorizes or requires a document to be served by post, then, until the contrary is proved, service:
>
> (a) (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and
>
> (b) (a) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.

(d) the respondent has never applied to set aside the said judgment of stay of the execution despite repeated demand for settlement of the judgment debt. Even without the judgment, the petitioner is still entitled to present the petition as winding up petition is not an execution proceedings. In *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd & other appeals* [2001] 4 MLJ 187, Gopal Sri Ram JCA opined:

> … a petition for winding up is not execution, for a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition. What is compelling evidence of the company's inability to pay its debts as and when they fall due …

(e) in *United Malayan Banking Corporation Berhad v Richland Trade & Development Sdn Bhd* [2000] 1 AMR 105, it was stated:

> …the alleged new address of the respondent was actually the address of the respondent's secretary, which also acted as secretary to a few other companies. The respondent was still at the old registered address when the petition was served on February 26 1992. In the circumstances, the service on the respondent was valid.

(f) in *Pengkalen Concrete Sdn Bhd v Chow Mooi & Anor*, it was stated:

> '… that nothing was indicated in O 10 r 1(1) of the Rules of the High Court 1980that the plaintiff must evidentially prove that, if the writ was sent by prepaid AR registered post, the named person in the writ must be the very person who had received it. In the instant case, all the prerequisites were fulfilled, and the fact that the recipient of the writ was 'Yanti' did not vitiate that service. In fact, whether that writ had physically arrived, or had been received at the last known address was not even legislated into O 10 r 1(1) of the Rules of the High Court 1980. If the plaintiff had direct and cogent evidence of that writ having been received by the intended person, that was a plus factor for the former, otherwise s 12 of the Interpretation Act 1967 would immediately come into play when invoked.

(g) in *Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd* [1994] 2 MLJ 266 at p 271, it was stated:

> … before a demand under s 218 can be relied upon as a basis for a winding up petition, the demand must have been served in accordance with the requirements of that section, namely, by leaving the notice of demand at the registered office of the respondent company … proof of actual physical delivery by a postal officer of a registered letter containing such a demand at the registered office of the company could be effective service within the terms of s 218.

(h) the case of *United Merchant Finance Berhad v Magpie Resources Sdn Bhd* [2001] 2 AMR 1801, the court has adopted and followed the decision of *Weng Wah* and further stated that:

> … the service of the demand on the respondent at its registered office by AR registered post was in fact actual delivery of the said demand to the respondent at its registered office and therefore should be accepted as good service of the said demand. In the circumstances the respondent's argument that the petition had failed to comply with the provision of s 218 of the Act should be rejected.

(i) in *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313, it was stated:

> … the presumption of inability to pay its debts only arises if the requirements of the section relating to the demand have been complied with and the company has for three weeks after service of the demand neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor … the presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. If the company does not have assets available to meet its current liabilities it is commercially insolvent and may be wound up.

(j) in *System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd* [1999] 1 AMR 1187, the court ruled:

> … the onus was upon the respondent to show that it was able to pay its debts. On the facts, the respondent's failure to do so gave rise to a rebuttable presumption that it was unable to pay its debts. Assets such as the contracts/tenders secured by the respondent, could not be immediately realised and therefore whether or not the respondent stood to gain from such contracts/tenders, could not be used as an excuse by the respondent, to avoid its liability to the Petitioner under the said contract. Future financial gains therefore would be immaterial in the context of s 218(2)(a) of the Act.

[6] The respondent inter alia submits:

(a) the case of *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 is distinguishable from this action.

(b) the judgment in default was served on the respondent at an invalid address despite the fact that the petitioner has been notified of the valid and current address of the respondent. The case of *Amanah Merchant Bank Bhd* was on service at a correct and valid address of the Defendant. This is totally different from the present case and thus distinguishable. The case of *Maril-Rionebel (M) Sdn Bhd & Anor* is distinguishable. In this case, the judgment in default was obtained by the petitioner against the respondent while parties were still

verifying the amounts allegedly to be outstanding. Hence, the amount herein is a disputed debt, unlike in the case of *Maril-Rionebel (M) Sdn Bhd.*

(c) the statutory demand was issued by the petitioner pursuant to s 218of the CA 1965. As such, the present case is governed by the CA 1965 and the Companies (Winding Up) Rules 1972 and that the RHC 1980 have no application herein. To justify this, the respondent relies on the following cases: (i) *Dayakuasa Holdings Sdn Bhd v Kayaal Holdings Sdn Bhd* [2003] 2 MLJ 263 and (ii) *Ho Siew Choong & Ors v Everworth Sdn Bhd* [2005] 2 CLJ 273.

[7] In reply to the case of *United Merchant Finance Bhd v Magpie Resources Sdn Bhd* [2001] 2 AMR 1801 as cited by the petitioner, the respondent urges the court not to follow the case of *United Merchant Finance Bhd* as it was not followed in the later case authorities as cited by the respondent.

[8] I have read the petition, the various affidavits filed herein and the relevant submissions of the parties. I must say that there is no statutory right to wind up the company under the CA 1965. The CA 1965 gives a discretion to the court to wind up the company based upon the justice of the case. I have dealt with the principles relating to winding up for inability to pay debts in my judgment in the case of *PT Bank Mandiri (Persero) TBK v Karambunai Corp Bhd (unreported, 20 June 2007; Kota Kinabalu High Court CWU–K28–54 of 2004).*I do not want to repeat the same here. Further, the court is not obliged to wind up a company because there is a judgment or judgment in default. The court, when exercising its discretion, must consider the justice of the case before the drastic step to wind up is exercised. For this very purpose, the court may look into the interests of the creditors as well as others who will directly or indirectly be affected by the order for winding up. In this case, I find that the issues raised by the respondent are ones which do not justify considerations for the court not to exercise its discretion.

[9] In my view, the real issue which the winding up court needs to know is whether the company is able to pay the money notwithstanding the fact that there are irregularities in the statutory demand or compliance with the provisions of the CA 1965. This is so because all such irregularities can be condoned if the court so decides pursuant to s 355(1) & (2) of the CA 1965 which states:

(1) No proceeding under this Act shall be invalidated by any defect, irregularities or deficiency of notice or time unless the court is of the opinion that substantial injustices have been or may be caused thereby which cannot be remedied by any order of the Court.

(2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect, irregularities or deficiency.

[10] On the facts of this case, I am satisfied that the provisions of the CA 1965 have been fully satisfied for the court to exercise its discretion to wind up the respondent.

[11] For the reasons stated above, I allow the petition with costs. I hereby so order. **A**

Petition allowed with costs.

Reported by Eugene Daniel Louis **B**

C

D

E

F

G

H

I